No. 21

In the Supreme Court of the United States

October Term, 1942.

WARREN-BRADSHAW DRILLING COMPANY, *Petitioner,*

vs.

O. V. HALL, INDIVIDUALLY, AND AS AGENT OF W. N. SLAID, EDGAR SLAID, E. S. MORGAN, A. D. HARMON, J. M. HUDDLESTON, J. R. MILLER, AND B. R. GRAY, *Respondents.*

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

The controversy between the parties arises out of the provisions of the Fair Labor Standards Act of 1938, involving particularly Sections 3 (j), 6 and 7 (a), set out in the appendix.

Statement of the Case.

On February 3, 1941, the respondents, as plaintiffs therein, instituted an action in the United States District Court for the Northern District of Texas, Amarillo Division, for the recovery of $4,667.56, as overtime for work done as employees of the petitioner, the plaintiffs alleging that they were all engaged in the production of goods for commerce, namely "in drilling wells for oil and gas during the time that these claimants were working in Moore, Hutchinson, Gray and Carson Counties in the State of Texas."

The answer of defendant, Warren-Bradshaw Drilling Company, denied that the plaintiffs worked for the defendant in any capacity which constituted interstate commerce, and further denied that the plaintiffs had ever performed any work or labor for the defendant for which they had not been fully paid, and denied that it was indebted to the plaintiffs, or either of them, in any sum whatever.

The case was tried to the court without a jury, which rendered a judgment that plaintiffs recover from the defendant, Warren-Bradshaw Drilling Company, as follows, to-wit:

Kenneth Volgamore	$112.40
O. V. Hall	602.00
W. N. Slaid	759.00
Edgar Slaid	396.50
E. S. Morgan	614.00
A. D. Harmon	554.04
J. M. Huddleston	544.00
J. R. Miller	373.00
B. R. Gray	338.00

(R. 141).

Petitioner prosecuted an appeal from the judgment of the District Court to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the lower court except for the amount allowed one claimant. Petitioner filed its petition for a writ of *certiorari*, which was granted by this court on June 8, 1942.

The opinion of the Circuit Court of Appeals will be found in the printed transcript (R. 157-162).

The District Court made no findings of fact as required by Rule 52-A of the Rules of Civil Procedure, which rule was held mandatory by this court in *Interstate Circuit* v. *United*

States, 304 U. S. 55, construing Equity Rule 70½ of like import.

The following are the pertinent and controlling facts in the case: that petitioner is the owner of rotary drilling equipment, and is an independent contractor engaged under contract with an oil and gas lessee to do a certain job, namely, to drill, by means of such rotary equipment, into the strata of the earth to a prescribed depth, upon the completion of which its contract was performed, and it thereupon removed from the leased premises its rig, either for storage or for further like employment; that the oil and gas lessee then might, if it saw fit, drill deeper into the strata, with cable tools, with the view of demonstrating whether oil or gas is present in that location; that respondents, as employees of petitioner, expected, when employed, to work, fifty-six hours and no more per week, at wages ranging from $6.50 to $11.00 per day, according to the kind of work performed, and which amounts were paid to them semi-monthly during the whole time they worked for the petitioner, and that they accepted such wages without protest or objection, claiming no additional compensation, and without notice to petitioner of any reservation of a claim therefor as overtime work; and no such claim was made until after their employment had ceased. As the facts stated will not, we believe, be disputed, we have not thought it necessary to refer to the pages of the record.

The points or propositions upon which petitioner relies for reversal are:

I.

A. That the provisions of the Fair Labor Standards Act were not applicable because petitioner, as their employer, was not, and cannot be presumed, upon the facts, to have

been, engaged in the business of mining for or producing oil or gas, or in any process for the production thereof, with the intent, hope, expectation or belief that its activities would result in the production of goods for interstate commerce.

B. That even if it can be said that petitioner in performing its contract with the oil company lessee, was motivated by the intent, hope or expectation that oil would be produced by the lessee after its contract with it was completed, respondents have failed to show by any substantial evidence that oil produced from the leaseholds on which they worked went into interstate commerce.

II.

That if the act is applicable, it has not been violated, but has been substantially complied with by the assurance to respondents, according to their own expectations at the time of their employment, of wages ranging from $45.50 to $77.00 per week of fifty-six hours, and that their unconditional acceptance of their pay checks for such amounts, over a long period of time, without claim and without notice to their employer that claim would be made for more, should estop them from asserting, after their employment had ceased, that such wages were not in full of their compensation, and that they were entitled to additional compensation for overtime.

ARGUMENT.

I-A.

It was the contention of respondents that the operations of petitioner, their employer, under its contract with the lease owner, were conducted with the knowledge, and the belief, hope or expectation that oil would be produced in the event that the hole drilled by the petitioner was later deepened and made a producing well by others with whom they had no contract relations, and that petitioner knew, or should have known, that if oil was produced after the petitioner's contract had been completed, that the same would move in interstate commerce. We do not think the record supports that contention. It is difficult to see on what ground it may be fairly assumed that petitioner in performing its contract with the lease-owner, did so with the intent, hope or expectation that oil or gas would be found and would ultimately move in interstate commerce; and that such intent, hope or expectation can be imputed to it. The fact that oil might ultimately be found, and particularly that if so found; it might move in interestate commerce, does not, we submit, make the transaction in which petitioner was engaged, one constituting interstate commerce.

In Interpretative Bulletin No. 5, published by the Federal Administrator of the Wage and Hour Division, 1940 Wage and Hour Manual, page 131, it is stated that,

> "Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods and production

> will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the act."

That test has received the approval of this court in *United States* v. *Darby Lumber Company*, 312 U. S. 100, 61 S. Ct. 451, in which it was said that production of goods for commerce as used in the act includes at least production of goods which at the time of production the employer, according to the normal course of his business, intends or expects to move in interstate commerce.

To indulge the presumption, as was done in this case, that one is presumed to know what he ought to know, merely begs the question. What ought the petitioner to know? There is nothing in this record upon which to base that presumption. In *Fleming* v. *Enterprise Box Company*, 37 Fed. Supp. 331, the court observed,

> "It seems safe to say that one is charged with knowing what he should have known."

In that case the Box Company was engaged in manufacturing boxes for cigars, including labels; the cigar boxes were produced from raw materials and transported in interstate commerce from states other than Florida. Substantially all of the boxes were produced for interstate commerce. In justification of the statement that the Enterprise Box Company should be charged with knowing what it should have known, the court called attention to the fact that the president of the Box Company had been, for many years, engaged as an employee in the manufacture of cigars in Florida, and that for many years he was the executive head of the defendant company in the manufacture and sale of cigar boxes, and also called attention to the fact, shown by

the evidence, that he manufactured boxes with labels of Clubs domiciled in other states, and other boxes with the names and domiciles of distributors in other states, concluding, "he therefore is presumed to have had more than the general knowledge of cigars and the cigar box business. He must have known that the cigar industry in Tampa, for a great many years, has been one of the prime industries of Tampa, and that many millions of cigars are manufactured annually in Tampa and sold throughout the greater part of the United States." There is no evidence in the record in this case upon which to indulge a similar presumption.

It was argued below that petitioner was presumed to know, and could not shut its eyes to, "the elementary facts of the oil business." But the oil business was not petitioner's business and we cannot, upon the facts disclosed in this record, impute to it the knowledge of another business.

In the bulletin above referred to, and indeed in the decided cases, the word "employer" is referable to the owner of physical property utilized in the production of goods, and beneficially interested in such production. The petitioner is in no such situation, for it had no beneficial interest whatever in the production of oil, and therefore can hardly be accused of indulging the hope or expectation of production, whether it moved in interstate commerce or not.

It is, of course, the nature of the employee's occupation that determines whether or not his employer is subject to the act. *Fleming* v. *Kirschbaum*, 38 Fed. Supp. 204.

In *Gerdert, et al.*, v. *Certified Poultry and Egg Co.*, 38 Fed. Supp. 964, it was said:

> "The minimum wages and maximum hours provision of the Fair Labor Standards Act relates to employees who are engaged in commerce, or in the produc-

tion of goods for interstate commerce, but it is difficult to see how an employee could be engaged in commerce unless his employer were likewise engaged, because the employee is merely agent of the employer."

In a footnote to the opinion, the language of Senator Pepper, a member of the Conference Committee which drafted the act, is quoted as follows:

> "I want it distinctly understood that this proposed law * * * is applicable only to those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce."

In *National Labor Relations Board* v. *Jones and McLaughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, it is said:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

But it was further said:

> "The scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a complete centralized government."

I-B.

We may concede that oil produced from wells is, generally, sold and delivered to the pipe line of the purchaser, but where is the proof of respondents' claim that they were all engaged in the production of goods for interstate com-

merce? Where is the proof as to who was the purchaser of the oil produced by the various oil and gas lessees with whom petitioner had contracts, and where is the proof that it was taken out of the State of Texas? That burden rested upon the claimants under the allegations of the complaint. They attempted, but failed to discharge it.

Mr. Bob Huff, Deputy Supervisor of the Texas Railroad Commission, testified as to the practice and requirements relative to pipe line connections and that before oil can be delivered to a pipe line certain procedure had to be followed, and that the Commission issues tenders for crude oil to go out of the state (R. 30). He made reference to Humble Oil and Refining Company which has a refinery at Bay City, Texas, and that "the Humble crude is tendered to the pipe line in Bay City, Texas."

Q. "You know they have a big refinery at Bay City?

A. Yes, sir. What goes with that lube and gasoline and by-products from there would be hearsay as far as I could testify. Might go to New York, and might go to Texas.

Q. In your business you don't keep up the percentage of crude that goes in the pipe line that is manufactured into other products?

A. We would know, if manfactured into other products, but wouldn't know what percentage went out of the state, or even foreign countries." (R. 81)

He also testified with reference to the "Standish," the "Magnolia," "Danciger," and "Panhandle Eastern Line," (R. 82-83) but there is no evidence that either of the respondents worked on any lease owned by either of those companies or that any oil was delivered to them. The Panhandle Eastern Pipeline Company is, apparently, also a producer of oil, but the witness testified:

"The only gas well I see on this list is Panhandle Sneed. I guess that is it and 24 Panhandle Eastern Line goes east. I think that their probable purchaser is Detroit and Indianapolis." (R. 83-84)

But of respondents, only O. V. Hall (R. 15), A. D. Harmon (R. 19), and J. M. Huddleston (R. 20), worked for petitioner on the Sneed lease. The witness testified that this was a gas well.

Harry W. Ferguson, an employee of Humble Oil and Refining Company, testified that some oil produced in Moore, Hutchinson, Gray and Carson Counties, was delivered to Humble Pipeline Company and delivered to the Baytown Refinery, and that approximately ninety to ninety-five per cent of that refining company's crude in the form of refined products was moved out of the state during the period of October 24, 1938, to January 1, 1941 (R. 105).

George Sheppard, comptroller of Public Accounts, State of Texas, testified that the monthly report filed by the distributor, Humble Oil and Refining Company, on the 20th of each month, for the preceding calendar month, shows the total gallons of motor fuel (gasoline) sold in export, interstate commerce, intrastate commerce, and sales to the Federal Government; and that Humble Pipe Line Company had not reported any sales of gasoline or motor fuel. The witness introduced a schedule showing the monthly reports filed by the Humble Oil and Refining Company showing sales of motor fuel (gasoline) for a period from October 1, 1938, to May 31, 1941, (R. 109) and testified:

"The Humble Oil & Refining Company do not report sales from their Baytown plant separately from their other plants."

The foregoing is the substance of all of the evidence relating to the disposition of oil produced from the leases on which the respondents worked. It seems to have been merely presumed that since "some" of the oil from wells in Moore, Hutchinson, Gray and Carson Counties was delivered to the Humble Company's pipe line, and that since respondents worked on some leases in those counties, therefore some of the oil from the leases on which respondents worked must have been delivered to the Humble Refining Company's refinery at Bay City, Texas—although apparently they had other refineries—and that some part of that oil was shipped out of the state.

II.

The respondents were employed and paid, not by the hour, but by the day, and, as we have heretofore shown, they voluntarily went to work, expecting to work fifty-six hours per week for a certain daily wage which they received and accepted, without protest or objection that they had not been fully paid, and without any claim or notice of claim that they expected additional compensation.

Take, for illustration, the case of W. N. Slaid, one of the respondents, who received and said he expected to receive $11.00 per day (called tour in oil field language) for seven days or fifty-six hours per week. (R. 59) The court allowed him $379.50 for overtime on the basis of $11.00 per day at $1.375 per hour, and to which was added the penalty of double the amount of overtime, in all $759.00. (R. 142) His silence with respect to overtime, and his failure to demand it during the whole period of his employment, when he received his pay checks, raises a strong presumption that both parties understood that such payment would be the

entire compensation coming to him in compliance with the act. The situation is substantially the same with respect to the other respondents. (R. 51, 61, 70 and 71)

In *Walling, et al.*, v. *A. H. Belo Corporation*, decided by this court, June 8, 1942, an agreement between the company and its employees, operated to secure to its employees the same wages paid to them before the effective date of the act, was upheld, the court saying that the act "does not bar employer from contracting with employees to pay them the same wages they previously received, so long as the new rate equals or exceeds the statutory minimum wage."

Petitioner, if it had been advised by its employees, or if it had been intimated by them, upon receipt of their first pay check, that it did not reflect payment in full of their work and that more was due them for time in excess of the statutory minimum hours, and had demanded payment thereof, could have terminated the employment from that time, or it could have retained or re-employed them, upon the terms of an express agreement, or mutual understanding, whereby the "straight" time or basic wage might be fixed at a minimum, and overtime at a sum one and one-half times the straight time so that the two together would equal the wage actually paid, and expected to be paid.

If respondents had the thought in their minds to continue the receipt of the wages expected for fifty-six hours' work so long as they were employed, but concealed from petitioner until their employment had ceased, the intent and purpose to claim overtime, surely there is nothing in the act compelling a court to sanction such unfair dealing with, and deception upon, their employer, and rewarding them for their duplicity by giving them double the amount

of wages for overtime; and they should be estopped from asserting such claim.

The action instituted by the respondents is, of course, predicated on the relation of employer and employee, and necessarily assumes some contract, agreement, or mutual understanding of the parties as its inception. We concede that there was no express or formal contract, either oral or in writing, between petitioner and its employees, but may not such an agreement be implied or presumed from the facts disclosed by the record? It is not at all difficult to gather from the record the elements of an offer, or proposal, and its acceptance, from which all contracts spring. Either the petitioner, in substance and effect, offered or proposed to respondents, as its employees, to work for it at so much per day on the basis of fifty-six hours a week, which they accepted, by entering the employment, continuing in it, working fifty-six hours a week and unconditionally accepting compensation of the said respective sums, without claim for more; or respondents made a like offer to petitioner, which it accepted by putting them to work, continuing in it, and paying them according to what they expected, at the time of the employment, to receive.

Since respondents as well as petitioner are charged with knowledge of the law, they must be presumed to have entered the employment knowing that fifty-six hours a week was twelve hours in excess of the statutory maximum for the first year of the act and fourteen hours for the second year, and that compensation for overtime was one and one-half times what we may call "straight time." As they expected to be paid, respectively, no more than $45.50, $49.00 and $77.00 for a week of fifty-six hours and made no claim for more, it can and should be assumed that they would and did

adjust the total wage to conform to the act by alloting part of the pay as straight time and part as overtime. Take for illustration the employee who was paid $7.00 a day, or $49.00 per week. For the first year of the act the hours would be twelve hours over the forty-four hours' maximum. Time and a half for the twelve hours would be the equivalent, for the purpose of computing compensation, of eighteen hours in excess of the maximum, or an average of $.79 per hour for sixty-two hours' work. Practically the same result is reached relative to the second year of the act.

It has been stated that one of the objects of the act was to encourage and promote the spread of work so that more people might be employed. While the record does not affirmatively so show, it is a known fact, and respondents know it probably better than anyone, that many workers prefer to work overtime in order to get the enhanced pay, and will quit employers who do not work men overtime and seek employment with others who do. That is natural. But there was no such temptation on the part of petitioner's employees, for they were getting as much, if not more than they would get elsewhere, including overtime work. It is fair to assume that this consideration, together with the fact, which we must recognize, that the amount of necessary overtime is dependent upon contingencies not readily foreseen, actuated the respondents in their preference for the system which eliminated the uncertainty of overtime work, and which assured them of unusally good wages upon which they could rely. The observation of this court in the *Bell* case, *supra*, relative to employees of a newspaper, is, we think, pertinent and applicable here. The court said:

> "Many such employees value the security of a regular weekly income. They want to operate on a family

budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This court should not."

We, therefore, respectfully submit, for the reasons stated, that the judgment should be reversed.

Respectfully submitted,

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APPENDIX.

Section 3(j);

"Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state.

Section 6:

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) During the first year from the effective date of this section, not less than 25 cents an hour,

(2) During the next six years from such date, not less than 30 cents an hour,

(3) After the expiration of seven years from such

date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the administrator issued under Section 8, whichever is lower, and

(4) At any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the administrator issued under Section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this act.

Section 7:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) For a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) For a workweek longer than forty-two hours during the second year from such date, or

(3) For a workweek longer than forty hours after the expiration of the second year from such date,

Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.